Ong Commodities Pte Ltd v Kek Tek Huat Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCVC-278–02 OF 2015
VAZEER ALAM MYDIN J
5 OCTOBER 2015

Civil Procedure — Discovery — Pre-action — Defendants charged property in favour of plaintiff as security for payments — Defendants claimed that they no longer indebted to plaintiff and asked plaintiff to sign discharge of charge form — Plaintiff filed action for discovery of documents related to charge over property — Whether defendants at liability to produce charge documents as and when requested by plaintiff — Whether breach of s 115 of the Companies Act 1965 entitled plaintiff for discovery — Whether plaintiff fulfilled essential requirements of discovery — Stay of proceedings — Delay in making application — Whether court could grant stay of proceedings — Injunction — Whether court could grant injunction without cause of action

The first defendant had created a charge over a property situated in Kuala Lumpur ('the property') in favour of the plaintiff to secure payments outstanding to the plaintiff. Based on the plaintiff's record, there was no foreclosure proceedings carried out against the property and thus contended that the property remains charged to the plaintiff. On 26 August 2010, the plaintiff received an email from the second defendant asking the plaintiff to sign Form 42B of the Companies Act 1965 ('the Act') for the discharge of charge over the property. The plaintiff took the position that the first defendant was still indebted to the plaintiff and refused to execute the said form. The plaintiff then filed the present action and sought under encl 1 for an order of pre-action discovery of documents under O 24 r 7A of the Rules of Court 2012 in respect of documents relating to the charge. The application under encl 1 was grounded on the fact that the plaintiff had reason to believe that the defendants had conducted themselves fraudulently or in otherwise improper or negligent manner in respect of the charge. The plaintiff also contended that the first defendant had a statutory obligation under s 115 of the Act to keep a copy of all charging documents and maintain a register of charges. On the other hand, the defendants argued that, they had forwarded the documents to the plaintiff and despite their best effort; the plaintiff continues to pressure them to produce documents that they did not have in their possession. The plaintiff also sought under encl 13 for a stay of decision of encl 1, an injunction against the defendants to prohibit them from presenting the documents exhibited in the defendants' affidavit in reply for the purpose of striking out the charge, and the defendants to produce the original documents mentioned in the defendants' affidavit in reply for the purpose of inspection.

Held, dismissing encls 1 and 13 with costs of RM8,000:

(1) The defendants had used their best endeavour to retrieve and produce documents in their custody, control or possession. The defendants could not be faulted for the plaintiff's own recklessness or negligence in not keeping proper records of their own. Nor do the defendants owe a duty to the plaintiff to securely keep these documents and produce them as and when the plaintiff required them (see para 22).

(2) If there was a breach of s 115 of the Act, then it would be for the appropriate authority to take action against the first defendant. Such a breach could not in any way entitle the plaintiff to an order to compel the production of these documents by the defendants, for the defendants had stated quite categorically under oath that they did not have these documents. Thus, the plaintiff had failed to establish the primary requirement for the grant of a pre-action discovery order, ie that the plaintiff required information and documents, which were in the possession, custody or control of the defendants (see para 23).

(3) Based on the documents and evidence, it was more probable than not that the charge had been satisfied and discharged. Therefore, the plaintiff had failed to establish the other essential requirement to support this application, which was that the plaintiff must have a bona fide cause of action against the defendants (see para 25).

(4) The plaintiff was not entitled to an order for discovery of documents based on some hunch or intuition that the defendants had committed some wrongful or fraudulent acts against the plaintiff. The law on discovery is well settled, that is, in the absence of a proper basis for an order for discovery, disclosure should not be allowed. Further, it is trite that an order of discovery will not be made, where the effect of such an order would have the effect of shifting the burden of proving fraud or impropriety from the plaintiff to the defendants. In the present case, order of discovery could not be made as the plaintiff sought to shift the burden of proof to the defendants (see paras 26–27).

(5) The plaintiff filed encl 13 on 10 August 2015, ie, three days before delivery of decision by the court. The plaintiff did not give any plausible reason for the delay in making this application at the eleventh hour. The plaintiff had dragged the defendants to court and it would be highly prejudicial to the defendants to stay proceedings and have the matter hanging in abeyance. Clearly, the filing of encl 13 was an abuse of process, to delay delivery of the decision of the court (see paras 31 & 36).

(6) The application for permanent prohibitory and mandatory injunctions was completely misplaced and was without any legal basis. It is well settled that injunction is a remedy that must flow from some established cause of action. The plaintiff's pleadings were devoid of any discernable

cause of action. In the circumstances, based on established case authority, no injunction could be granted as prayed (see paras 33–34).

[Bahasa Malaysia summary

Defendan pertama telah membuat gadaian ke atas hartanah yang terletak di Kuala Lumpur ('hartanah') bagi pihak plaintif untuk mendapatkan bayaran tertunggak kepada plaintif. Berdasarkan rekod plaintif, tiada prosiding rampasan yang dijalankan terhadap hartanah tersebut dan dengan itu menegaskan bahawa hartanah kekal digadaikan kepada plaintif. Pada 26 Ogos 2010, plaintif menerima e-mel daripada defendan kedua meminta plaintif menandatangani Borang 42B Akta Syarikat 1965 ('Akta') untuk pelepasan gadaian atas harta tersebut. Plaintif menganggap bahawa defendan pertama masih terhutang kepada plaintif dan enggan menyempurnakan borang tersebut. Plaintif kemudian memfailkan tindakan ini dan diminta di bawah lampiran 1 untuk mendapatkan perintah untuk penemuan pra-tindakan dokumen di bawah A 24 k 7A Kaedah-Kaedah Mahkamah 2012 berhubung dokumen-dokumen berkaitan dengan gadaian tersebut. Permohonan di bawah lampiran 1 adalah berdasarkan fakta bahawa plaintif mempunyai sebab untuk percaya bahawa defendan telah bertindak secara menipu atau secara tidak wajar atau cuai berhubung gadaian tersebut. Plaintif juga menegaskan bahawa defendan pertama mempunyai kewajipan statutori di bawah s 115 Akta untuk menyimpan salinan semua dokumen gadaian dan menyenggarakan satu daftar gadaian. Sebaliknya, defendan berhujah bahawa, mereka telah mengemukakan dokumen tersebut kepada plaintif dan meskipun dengan usaha terbaik mereka; plaintif terus memberi tekanan kepada mereka untuk mengemukakan dokumen-dokumen yang mereka tidak punyai dalam milikan mereka. Plaintif juga memohon di bawah lampiran 13 untuk satu penangguhan keputusan lampiran 1, injunksi terhadap defendan untuk melarang mereka daripada menyerahkan dokumen yang dipamerkan dalam afidavit balasan defendan bagi tujuan membatalkan pertuduhan tersebut, dan defendan-defendan untuk mengeluarkan dokumen-dokumen asal yang dinyatakan dalam afidavit balasan defendan untuk tujuan pemeriksaan.

Diputuskan, menolak lampiran 1 dan 13 dengan kos sebanyak RM8,000:

(1) Defendan telah menggunakan usaha terbaik mereka untuk mengeluarkan dan menghasilkan dokumen dalam jagaan, kawalan atau pemilikan mereka. Defendan-defendan tidak boleh disalahkan kerana perbuatan melulu plaintif sendiri atau kecuaian tidak menyimpan rekod mereka sendiri dengan sewajarnya. Begitu juga defendan tidak mempunyai kewajipan terhadap plaintif untuk menyimpan dokumen-dokumen dengan selamat dan mengeluarkan mereka pada bila-bila plaintif memerlukan dokumen-dokumen tersebut (lihat perenggan 22).

(2) Jika terdapat pelanggaran s 115 Akta, maka pihak berkuasa yang

berkenaan perlu mengambil tindakan terhadap defendan pertama. Pelanggaran sedemikian tidak boleh dalam apa jua cara memberi hak kepada plaintif untuk suatu perintah untuk memaksa pengemukaan dokumen-dokumen oleh defendan-defendan, kerana defendan-defendan telah menyatakan secara tanpa bersyarat bersumpah bahawa mereka tidak mempunyai dokumen-dokumen tersebut. Oleh itu, plaintif gagal membuktikan keperluan utama bagi pemberian sesuatu perintah pra-diskoveri, iaitu bahawa plaintif yang memerlukan maklumat dan dokumen, yang berada dalam milikan, jagaan atau kawalan defendan (lihat perenggan 23).

(3) Berdasarkan dokumen-dokumen dan bukti, adalah lebih berkemungkinan daripada tidak bahawa pertuduhan tersebut telah dipenuhi dan dilepaskan. Oleh itu, plaintif gagal membuktikan keperluan penting yang lain untuk menyokong permohonan ini, iaitu plaintif mesti mempunyai kausa tindakan suci hati terhadap defendan-defendan (lihat perenggan 25).

(4) Plaintif tidak berhak mendapat suatu perintah untuk diskoveri dokumen berdasarkan beberapa firasat atau gerak hati bahawa defendan telah melakukan beberapa tindakan salah atau penipuan terhadap plaintif. Undang-undang mengenai diskoveri yang terpakai, ialah, dalam ketiadaan asas yang betul untuk mendapatkan perintah untuk diskoveri, pendedahan tidak harus dibenarkan. Selain itu, adalah tidak dipertikaikan bahawa perintah diskoveri tidak akan dibuat, di mana kesan perintah tersebut akan mempunyai kesan memindahkan beban membuktikan penipuan atau salah laku daripada plaintif kepada defendan-defendan. Dalam kes ini, perintah diskoveri tidak boleh dibuat memandangkan plaintif menuntut untuk mengalihkan beban bukti kepada defendan (lihat perenggan 26–27).

(5) Plaintif memfailkan lampiran 13 pada 10 Ogos 2015, iaitu, tiga hari sebelum pengumuman keputusan oleh mahkamah. Plaintif tidak memberi apa-apa sebab yang munasabah untuk kelewatan dalam membuat permohonan ini pada saat akhir. Plaintif telah mengheret defendan-defendan ke mahkamah dan adalah amat memudaratkan kepada defendan-defendan untuk menggantung prosiding dan membiarkan perkara tersebut tergantung begitu sahaja. Jelas sekali, memfailkan lampiran 13 adalah penyalahgunaan proses untuk melambatkan pengumuman keputusan mahkamah (lihat perenggan 31 & 36).

(6) Permohonan untuk larangan kekal dan injunksi mandatori adalah taksiran salah dan dibuat tanpa apa-apa asas undang-undang. Umum mengetahui bahawa injunksi adalah remedi yang harus mengalir daripada beberapa kausa tindakan. Pliding plaintif tidak mempunyai apa-apa kausa tindakan yang boleh ditentukan. Dalam keadaan ini,

berdasarkan autoriti kes yang dibuktikan, tiada injuksi boleh diberikan sepertimana yang dipohon (lihat perenggan 33–34).]

Notes

For cases on pre-action, see 2(2) *Mallal's Digest* (5th Ed, 2015) paras 3240–3245.

Cases referred to

Abx Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd [2003] MLJU 529; [2003] 7 CLJ 357, HC (refd)
Ashworth Hospital Authority v MGN Ltd [2002] 1 WLR 2033; [2002] 4 All ER 193, HL (refd)
Berkeley Administration Inc v McClelland [1990] FSR 381, CA (refd)
British Steel Corporation v Granada Television Ltd [1981] AC 1096, CA (refd)
Chan Pooi Leng v Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar (Mohamad Iqbal Shah bin Abdullasah, intervener/applicant) [2015] 9 MLJ 121, HC (refd)
First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad [1993] 2 MLJ 497, SC (refd)
Ghazali bin Arifin v Ahmad bin Bakar & Ors [1992] 1 MLJ 282, HC (refd)
Kenwood Electronics (Malaysia) Sdn Bhd v Peoples' Audio Sdn Bhd & Ors [2003] 5 MLJ 276; [2003] 2 AMR 70; [2003] 5 CLJ 436, HC (refd)
Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor [1997] 2 MLJ 472; [1997] 3 CLJ 197, CA (refd)
Ng v R [1958] AC 173, PC (refd)
Nishimatsu Construction Co Ltd v Kecom Sdn Bhd [2009] 2 MLJ 404; [2008] 6 CLJ 149, CA (refd)
Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133, HL (refd)
RHB Bank Bhd v Ab Malik Abdullah & Ors [2010] 6 CLJ 981, HC (refd)
Shaw v Vauxhall Motors Ltd [1974] 1 WLR 1035; [1974] 2 All ER 1185, CA (refd)
Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina [1979] AC 210, HL (refd)
Stemlife Bhd v Bristol-Myers Squibb (M) Sdn Bhd [2008] MLJU 354; [2008] 6 CLJ 200, HC (refd)
Triplex Safety Glass Co Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 KB 395, CA (refd)

Legislation referred to

Companies Act 1965 ss 11(1), 115, Forms 34, 42B
Evidence Act 1950 s 90
Rules of Court 2012 O 24, O 24 rr 7A, 7A(1), (5), 10, 11, 12, 13, 16

Choi Kian You (Albar & Partners) for the plaintiff.
MS Raman (Thevin Chandran & Assoc) for the defendants.

Vazeer Alam Mydin J:

THE APPLICATION — ENCL 1

[1] The plaintiff vide this originating summons ('encl 1') is seeking an order for pre-action discovery of documents pursuant to O 24 r 7A of the Rules of Court 2012 ('the ROC').

[2] The discovery sought is in respect of documents relating to a charge over land known as Lot 22, Section 48, Town and District of Kuala Lumpur held under CT 3114 ('the property') given in favour of the plaintiff sometime in 1976 ('the charge') and in particular seeks discovery of:

(a) all documents pertaining to the title to the property;

(b) all documents pertaining to the charge;

(c) all documents pertaining to the open charge registered with the Companies Commission of Malaysia on 23 April 1976 under the first defendant in favour of the plaintiff ('CCM charge'); and

(d) all documents evidencing the first defendant's understanding that the first defendant is deemed to have their shares pledged to the plaintiff sold off and that the first defendant is no longer in debt with the plaintiff, as stated in the second defendant's email dated 26 August 2010.

[3] The grounds of the application are that:

(a) the plaintiff has reason to believe that the defendants had conducted themselves fraudulently or in an otherwise improper or negligent manner in respect of the charge; and

(b) therefore the plaintiff seeks to obtain sufficient documentary evidence from the defendants to put the plaintiff in a position where it is able to make a reasonable assessment of the situation and decide whether to institute an action against the first defendant and/or such other parties.

THE LAW

[4] Before I proceed to consider the merits of the application, let me set out the law as it relates to applications of this nature. Prior to the coming into force of O 24 r 7A of the ROC, the jurisdiction of the court to grant pre-action discovery was somewhat limited. This was reiterated by Gopal Sri Ram JCA in *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404; [2008]

6 CLJ 149 (CA) to the effect that:

> Save in the circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery that is to say discovery in anticipation of the action being filed.

Of course the *Norwich Pharmacal* case was the landmark decision of the English House of Lords that established the right of a person to seek an order for pre-action discovery against potential parties to an anticipated action or against third parties who may be in possession of information or documents that may assist the applicant to identify the wrongdoer and file an action. Now, that right to seek pre-action discovery is procedurally codified in O 24 of the ROC.

[5] It must be gainsaid that to some extent O 24 r 7A of the ROC overlaps with the principles enunciated in the *Norwich Pharmacal* case, which principles was adopted and applied by our Supreme Court in *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 2 MLJ 497 and subsequently in several other cases (see also the cases of *Lee Lim Huat v Yusuf Khan bin Ghows Khan & Anor* [1997] 2 MLJ 472; [1997] 3 CLJ 197 (CA); *Stemlife Bhd v Bristol-Myers Squibb (M) Sdn Bhd* [2008] MLJU 354; [2008] 6 CLJ 200; and *RHB Bank Bhd v Ab Malik Abdullah & Ors* [2010] 6 CLJ 981).

[6] The remedy of pre-action discovery is primarily intended to enable justice to be done — see O 24 r 7A(5). The House of Lords in *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033; [2002] 4 All ER 193, quoted with approval the words of Templeman LJ in *British Steel Corporation v Granada Television Ltd* [1981] AC 1096 at p 1132 to the following effect:

> In my judgment, the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer, *provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice*. The remedy of discovery is intended in the final analysis to *enable justice to be done*. (Emphasis added.)

[7] The grant or refusal of an order for pre-action discovery under O 24 r 7A is a discretion vested in this court. The exercise of that judicial discretion is not arbitrary but done by application of set judicial principles. The principles upon which the courts exercise their discretion in this regard may be summarised as follows:

(a) the plaintiff/applicant must have or show a bona fide cause of action against the persons known or unknown;

(b) the plaintiff/applicant must establish that the plaintiff/applicant requires information and documents which are in the possession, custody or

control of the defendant/respondent; and

(c) the information and documents sought are necessary for the plaintiff/applicant to properly institute proceedings against persons known or unknown.

[8] In this regard, the affidavit in support of the application must meet the following requirements:

(a) the affidavit must specify or describe the documents sought;

(b) the affidavit must show, if practicable by reference to any pleading served or to be served in the proceedings, that such documents are relevant to an issue arising or likely to arise out of the claim made or likely to be made in the proceedings, or identity of the likely parties to the proceedings, or both;

(c) the affidavit must show that the person against whom the order is intended to be made is likely to have or have had such documents in his possession, custody or power; and

(d) in the case of r 7A(1), the affidavit must state the grounds on which the person against whom the order is intended is likely to be party to subsequent proceedings.

(See *Shaw v Vauxhall Motors Ltd* [1974] 1 WLR 1035; [1974] 2 All ER 1185 (CA); and the commentary in the *Malaysian Civil Procedure* 2015, Vol 1, Sweet & Maxwell, at p 353).

THE BACKGROUND FACTS

[9] The first defendant had at the material time beginning from 1974 maintained a trading account with the plaintiff to trade in commodities. To secure payments outstanding to the plaintiff, the first defendant had created charges over two properties, namely:

(a) the property; and

(b) a property known as Lot 1106, Section 57, Town and District of Kuala Lumpur ('the second property').

[10] The plaintiff states that based on its records, the documents evidencing the charges created over the property and the second property were kept by the plaintiff's then solicitors, Messrs Skrine & Co, and a copy was kept by the first defendant, without a copy being extended to the plaintiff. By virtue of the first defendant's default in paying the sums secured by the charges, the plaintiff proceeded with foreclosure action against the second property, which was then sold by way of public auction on 18 October 1978 for the sum of RM363,000.

[11] The plaintiff states that based on its records, no foreclosure proceedings were carried out against the property and therefore asserts that the property remains charged to the plaintiff. Sometime on or about 26 August 2010, the plaintiff received an email from the second defendant, who is the present company secretary of the first defendant, inter alia, stating that the first defendant is deemed to have their shares pledged to the plaintiff sold off and that the first defendant is no longer indebted to the plaintiff. In this regard, the second defendant enclosed copies of Form 42B (Companies Act 1965) for the execution of the plaintiff. The Form 42B was ostensibly for the purpose of discharging the CCM charge dated 23 April 1976 registered as charge No 1 with the Companies Commission of Malaysia ('the CCM').

[12] The plaintiff further states that upon perusing the attachments to the aforesaid email, in particular the Form 42B, the plaintiff believes that it surely must relate to the discharge of the charge over the property and not to a charge in respect of shares allegedly pledged by the first defendant to the plaintiff. The plaintiff vide its solicitors' letter dated 22 April 2014 (exh 'OKT8'), took the position that the first defendant was still indebted to the plaintiff and refused to execute the Form 42B to register the discharge of the CCM charge. The plaintiff then sought all documents relating to the charge and the CCM charge to be furnished by the first defendant.

[13] The first defendant, replied vide its solicitors' letter dated 12 May 2014 (exh 'OKT9') refuting that they were still indebted to the plaintiff. The first defendant also stated that they do not have in their possession documents evidencing the creation of the CCM charge nor documents evidencing the charge created over the property.

[14] The plaintiff's current solicitors then wrote to the plaintiff's then solicitors, Messrs Skrine & Co, who had acted for the plaintiff in respect of the creation and registration of the charge, requesting for documents pertaining to the same. However, the plaintiff did not receive any reply from Messrs Skrine & Co. The plaintiff's then personnel who were privy to the transactions with the first defendant, ie the late Mr Ong Tjin An, who was a director of the plaintiff, has since passed on, and another employee Tjio Kay Loe, has left the plaintiff's employment with effect from 12 July 1977. The plaintiff states that the attempts to contact the said Tjio Kay Loe had been futile. The plaintiff then filed this action to compel the first and second defendants to make discovery of these documents.

THE MERITS OF THE APPLICATION

[15] An analysis of the affidavit evidence shows that the CCM vide its letter dated 16 March 2015 (exh 'YCM9') had informed the first defendant that a

copy of the Form 34 ('Companies Act 1965') in respect of the creation of the CCM Charge could not be supplied since the document is no longer in its custody. The CCM had cited s 11(11) of the Companies Act 1965 that provides that the registrar may, if in his opinion it is no longer necessary or desirable to retain them, destroy any document creating or evidencing a charge or the complete or partial satisfaction of a charge where a memorandum of satisfaction of a charge has been registered for not less than seven years. The plaintiff also confirms this fact. The plaintiff's manual search at the CCM returned no results evidencing the registration of the CCM charge due to the long lapse of time.

[16] The defendants' solicitors also conducted a search at the relevant land office to extract information on the charge. However, the land search result came back with a note 'tiada', which the defendants took to mean that no information on the charge was available at the land office. The plaintiff's solicitors also conducted a search at the relevant land office, and the result showed that the property was now held under 'Geran 12765' instead of 'CT 3114'. However, the land search did not reveal any information as regards the charge.

[17] The defendants had also made a thorough search of all records in their possession and found some contemporaneous correspondence and documents in respect of the charge and the discharge of the charge. However, the defendants were unable to trace the charge documents itself. From these retrieved correspondence and documents, it would appear that the first defendant did create the charge in favour of the plaintiff. However, it also appears from these documents that the charge was fully satisfied and the plaintiff issued a letter dated 5 September 1977 to then Pendaftar Syarikat Malaysia to the effect that the charge had been satisfied on 12 August 1977 (exh 'YCM1').

[18] Pursuant thereto, as required by the Companies Act 1965, the first defendant made a statutory declaration verifying memorandum together with a necessary memorandum in Form 43 to state that the property is released from the registered charge or has ceased to form part of company's property or undertaking and presented the same for registration at the office of the Pendaftar Syarikat Malaysia (exh 'YCM2'). And pursuant thereto, the then assistant registrar of companies, Malaysia, issued to the first defendant a certificate of registration of satisfaction of charge dated 14 October 1977 (exh 'YCM3'). This would mean that the CCM charge has been satisfied.

[19] The satisfaction of the CCM charge is further corroborated by the contemporaneous exchange of correspondence between the plaintiff's and first defendant's then solicitors (exhs 'YCM4' to 'YCM6'). These correspondence

show that there was negotiations between the plaintiff and the first defendant in respect of the settlement of the monies owing by the first defendant to the plaintiff. It appears that the plaintiff and the first defendant had agreed to a settlement figure of $275,000 (now RM) as full and final settlement. It also appears from the correspondence that a sum of $75,000 was paid by the first defendant to the plaintiff's then solicitors, for which receipts were issued by the plaintiff's then solicitors (exh 'YCM7'). As for the balance of $200,000, it appears that an undertaking to pay the same was provided by the first defendant's then solicitors, Messrs Chooi & Co, to the plaintiff's then solicitors. Although there are no documents evidencing the payment of the balance settlement sum of $200,000, the first defendant states that the same had been settled because:

(a) a discharge was executed and fees were paid to the plaintiff's solicitors for preparing the discharge of charge (exh 'YCM8'); and

(b) upon the discharge, the title appears to have been subsequently transferred to third parties (exh 'OKT10').

[20] The defendants submit that after having spent considerable time, effort and cost to search and obtain whatever documents that they reasonably could procure; and after having forwarded them to the plaintiff, the plaintiff unreasonably continues to challenge the accuracy and veracity of these documents, in the hope of stringing together a case against the first defendant. The defendants argue that despite their best efforts, the plaintiff continues to pressure them to produce documents that they do not have in their possession or custody, and accuse them of fraudulent, improper and/or negligent conduct without any basis at all.

[21] I find that there is much merit in the defendant's argument. I agree with the defendant's contestation that documents that have been produced by the defendants were made a very long time ago, ie some 39 years ago, and in such circumstance, the presumption of due execution and attestation under s 90 of the Evidence Act 1950 would apply. See *Ghazali bin Arifin v Ahmad bin Bakar & Ors* [1992] 1 MLJ 282; and *Chan Pooi Leng v Jabatan Ketua Pengarah Tanah Dan Galian Persekutuan Unit Pembahagian Pusaka Perak Timur, Pejabat Tanah/Daerah, 33000 Kuala Kangsar (Mohamad Iqbal Shah bin Abdullasah, intervener/applicant)* [2015] 9 MLJ 121.

[22] I further find that the defendants have used their best endeavor to retrieve and produce documents in their custody, control or possession. The defendants contend that they have produced all the correspondence and documents that can possibly be produced by them and that they have no other documents relating to the charge or the CCM charge in their custody or possession. In the circumstance, it would be rather illogical for the plaintiff to

seek the assistance of this court for an order to compel production of documents that the defendants say they do not have in their possession or to which they have access. The defendants cannot be faulted for the plaintiff's own recklessness or negligence in not keeping proper records of their own. Nor do the defendants owe a duty to the plaintiff to securely keep these documents and produce them as and when the plaintiff requires them.

[23] The plaintiff contends that the first defendant has a statutory obligation under s 115 of the Companies Act 1965 to keep a copy of all charging instruments and maintain a register of charges at the registered office of the company. The plaintiff further contends that the CCM charge is one that is captured by s 115 of the Companies Act 1965 and therefore the first defendant ought to be ordered to produce the same. I agree that there is a statutory obligation on the part of the first defendant as a company to conform to the requirements of s 115 of the Companies Act 1965. Obviously, going by the evidence adduced thus far, the first defendant did not securely keep a copy of the CCM charge or maintain a register of charges at its registered office. Now, if there were a breach of s 115 of the Companies Act 1965, then it would be for the appropriate authority to take action against the first defendant. Such a breach cannot in any way entitle the plaintiff to an order to compel the production of these documents by the defendants, for the defendants have stated quite categorically under oath that they do not have these documents. As such the plaintiff has failed to establish the primary requirement for the grant of a pre-action discovery order, ie that the plaintiff requires information and documents, which are in the possession, custody or control of the defendants. In the circumstance, it is obvious that the making of such an order would be an exercise in futility and would not serve any useful purpose.

[24] The defendants have stated that the contents of the email dated 26 August 2010, stating, inter alia, that the first defendant is deemed to have their shares pledged to the plaintiff sold off and that the first defendant is no longer indebted to the plaintiff, was written erroneously under a misapprehension of facts by the second defendant. It is obvious that the second defendant did not have any direct knowledge of transaction between the plaintiff and the first defendant. Indeed the plaintiff too believes that the discharge of charge referred to by the second defendant in the email could only be in regards to the charge over the property and not to any pledge of shares. After all it is common ground that the first defendant did not at any time pledge any shares to the plaintiff as security for repayment of its debts to the plaintiff.

[25] And, in any event, based on the documents and correspondence before the court, it is more probable than not, that the charge had been satisfied and discharged. Therefore, it would appear that the plaintiff has failed to establish

the other essential requirement to support this application, which is that the plaintiff must have a bona fide cause of action against the defendants. An order for discovery would be granted only when the plaintiff can demonstrate to the court that it has some cause of action against the defendants, which in this case the plaintiff has failed to do.

[26] The plaintiff has stated in the grounds in support of this application that the plaintiff has reason to believe that the defendants had conducted themselves fraudulently or in an otherwise improper or negligent manner in respect of the charge; and therefore the plaintiff seeks to obtain sufficient documentary evidence from the defendants to put the plaintiff in a position where it is able to make a reasonable assessment of the situation and decide whether to institute an action against the first defendant and/or such other parties. This express desire of the plaintiff is but a manifestation of an intention to go on a fishing expedition, in hope that something may get entangled in the net and finding some material upon which a charge could be hung. That is never the purpose of a pre-action discovery order. See *Abx Logistics (Malaysia) Sdn Bhd v Overseas Bechtel (Malaysia) Sdn Bhd* [2003] MLJU 529; [2003] 7 CLJ 357. It is quite clear that the plaintiff has embarked on a fishing expedition and cast the net wide to seek information and documents from the defendants, which documents the defendants do not have, in the hope of stringing together a possible case against the defendants. That is not the purpose for an order of discovery. Mustil LJ in *Berkeley Administration Inc v McClelland* [1990] FSR 381 at p 383 held that:

> It is plain ... that the plaintiff just do not believe anything that the defendants have said in the course of this discovery, and would like to hunt around the documents in the hope that something useful would turn up enabling them to controvert what the defendants have said on oath. That is not what discovery is about at all.

The plaintiff is not entitled to an order for discovery of documents based on some hunch or intuition that the defendants have committed some wrongful or fraudulent acts against the plaintiff. The law on discovery is well settled ie, in the absence of a proper basis for an order for discovery, disclosure should not be allowed.

[27] The plaintiff alleges that the defendants have committed some fraudulent or wrongful act. In this regard the plaintiff bears the burden of proving fraud, improper conduct or negligence against the defendants. Now, it is trite that an order of discovery will not be made, where the effect of such an order would have the effect of shifting the burden of proving fraud or impropriety from the plaintiff to the defendants. Not only is the plaintiff seeking to shift the burden of proof, it is also seeking to incriminate the defendants. In such, circumstance, an order of discovery cannot be made. See *Kenwood Electronics (Malaysia) Sdn Bhd v Peoples' Audio Sdn Bhd & Ors* [2003] 5 MLJ 276; [2003] 2 AMR 70; [2003] 5 CLJ 436 (HC); *Triplex Safety Glass Co*

Ltd v Lancegaye Safety Glass (1934) Ltd [1939] 2 KB 395; and *Ng v R* [1958] AC 173.

[28] Wherefore, I find that the plaintiff has failed to establish is case for the orders sought and as such I dismissed the originating summons with cost of RM8,000.

ENCLOSURE 13

[29] Enclosure 13 was the plaintiff's application for an order:

(a) that the proceedings herein including the decision of the originating summons (encl 1) which was fixed to be delivered on 13 August 2015 be stayed/adjourned pending the disposal of this notice of application or any other further order;

(b) for an injunction against the defendants to prohibit the defendants whether by themselves or their agents from presenting the documents exhibited as exh 'YCM2' and 'YCM3' in the defendant's affidavit in reply affirmed by the second defendant on 1 April 2015 ('the said documents') to the CCM for the purposes of striking out/cancelling the CCM charge, or in the event that the said documents have been presented to the CCM, the defendants be ordered to forthwith inform the CCM to withhold perfection or completion of the discharge/striking out of the CCM charge and that the said documents be retrieved/collected back from the CCM; and/or

(c) that the defendants be ordered to produce the original documents (those which are available) or a copy of the documents referred to and mentioned in the defendants' affidavit in reply affirmed by the second defendant on 1 April 2015 and marked as exhs 'YCM1', 'YCM2' and 'YCM3' ('the documents to be inspected') for the purposes of inspection by the plaintiff and/or its expert document examiner and to permit copies of the documents to be inspected to be taken, pursuant to O 24 rr 10–13 and r 16 of the ROC, within seven days of the order.

[30] I dismissed encl 13 for the following reasons. The plaintiff filed the originating summons on 23 February 2015 and on 2 April 2015 the defendants filed their main affidavit in reply, which was affirmed on 1 April 2015 by the second defendant. There were three case managements dates at which directions for filing of affidavits and submissions were given. When the originating summons was called for hearing on 19 June 2015, counsel for the plaintiff and defendants stated that they stood by their respective written submissions and asked for a decision date be fixed for encl 1. I then fixed 13 August 2015 as the date to deliver decision on the originating summons. Now, if the plaintiff had wanted to file any interlocutory applications in respect

of the documents disclosed in the second defendant's affidavit affirmed on 1 April 2015, which was filed and served on 2 April 2015, the plaintiff could have done so well before the date fixed for the delivery of decision on the originating summons on 13 August 2015. However, the plaintiff filed encl 13 on 10 August 2015, ie three days before delivery of decision on 13 August 2015 seeking the several orders for inspection of documents, prohibitory and mandatory injunctions and stay of proceedings. It must be gainsaid that at the date on which encl 13 was filed, the only pending matter in respect of this proceedings was the delivery of my decision on the originating summons. The plaintiff did not give any plausible reason for the delay in making this application at the eleventh hour. The plaintiff has dragged the defendants to court and it would be highly prejudicial to the defendants to stay proceedings and have the matter hanging in abeyance.

[31] In any event, the plaintiff's application in the originating summons is for discovery of documents pursuant to O 24 r 7A of the ROC. I fail to see how an order for inspection by a document examiner of the documents alluded to and exhibited in the second defendant's affidavit in reply dated 1 April 2015 could in any way assist the court in coming to a decision on that application.

[32] Further, the application for permanent prohibitory and mandatory injunctions is completely misplaced and is without any legal basis. Now, it is well settled that injunction is a remedy that must flow from some established cause of action. In *Nishimatsu Construction Co Ltd v Kecom Sdn Bhd* [2009] 2 MLJ 404; [2008] 6 CLJ 149 (CA), Gopal Sri Ram JCA held that:

> ... the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained.

That was a reiteration of the principle that was enunciated by Lord Diplock in *Siskina (Cargo Owners) v Distos Cia Naviera SA, The Siskina* [1979] AC 210 where the learned judge stated that:

> The right to obtain an interlocutory injunction is merely ancillary to the pre-existing cause of action. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

[33] As I have pointed out earlier, the plaintiff's pleadings are devoid of any discernable cause of action. In the circumstance, based on established case authority, no injunction can be granted as prayed.

[34] In the circumstance, I fail to see any special circumstance warranting a stay of proceedings, where at this stage, only the delivery of my decision on encl 1 remained.

[35] Clearly, the filing of encl 13 is an abuse of process, to delay delivery of the decision of the court, and nothing more. Wherefore, I dismissed encl 13.

Enclosures 1 and 13 dismissed with costs of RM8,000.

Reported by Dzulqarnain Ab Fatar